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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1567

WILLIAM MICHAEL BRYAN,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit, sought to be reviewed by the Petitioner herein is reported as *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir., 1975).

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JURISDICTION

Respondent acknowledges the petition was timely filed and that the Court's jurisdiction is allegedly invoked pursuant to 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Respondent accepts the "question presented" as tendered by Petitioner and will respond thereto in the argument portion of this response.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions referred to by Petitioner as being involved in this case are properly listed in the petition and will not be restated herein.

STATEMENT OF THE CASE AND FACTS

This case arose when the Petitioner was charged by information with the second degree murder of one William Thomas Boes which occurred on February 12, 1972.

After a previous trial had ended in a mistrial, the jury was selected on June 8, 1972, and testimony taken on June 9, 12, 13, 1972.

After the jury had been deliberating some five and one-half hours, the court caused the jury to be returned and upon finding out that they were not close to rendering a verdict, gave a supplemental jury charge. The jury was again returned after a total of six hours deliberation and the following occurred:

* * *

"THE COURT: Ladies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time?

"JUROR: I believe we're closer to it than we were. I have that idea.

"THE COURT: If I give you another 20 minutes, will that be enough. You want to give it a try for 20 minutes?

"JUROR: All right.

"THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room."

* * *

After the jury had retired, Mr. Mahon, Petitioner's counsel, objected:

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* * *

"MR. MAHON: Your Honor, I would like to object in the record to the Court's procedure of placing a time limit of 20 minutes on the jury's deliberations. I think the Court would have to give them some type of instruction with regard to the 20 minutes. I think they are now under -- they don't know that they can be discharged. I think they're now in the position that they have got to be --

"THE COURT: I had asked them whether or not they would be able to arrive at a verdict in a short period of time. The forelady indicated she thought they would. I said if they had an additional 20 minutes. I think they'll stand up.

"MR. MAHON: All right, sir.

"THE COURT: In other words, I didn't give them a time limit. I just gave them the time they requested. I --

"MR. MAHON: I feel like that the -- I feel the Court advised them they could deliberate for an additional 20 minutes. I'm not sure the jury knows they can be discharged.

"THE COURT: At the end of 20 minutes, I'll inquire again.

"MR. MAHON: If a juror feels conscientiously one way or the other, I think now that juror feels they must decide within 20 minutes about the matter.

"THE COURT: I disagree with you because it's the jury that made that indication, and they're not going to consider whether or not they can be discharged either.

"MR. MAHON: I think the only thing I would request is that they be advised that they did not have to change their decision within 20 minutes or make a decision within 20 minutes, but that they could do it.

"THE COURT: I haven't told them anything in connection with 20 minutes. They're expecting to be called out again in 20 minutes and another inquiry made right now. That is all they're expecting right now."

* * *

At no time did Petitioner's counsel move for a mistrial. Seventeen minutes later, the jury returned its verdict finding Petitioner guilty of the lesser included offense of manslaughter.

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On appeal to the District Court of Appeal, First District, State of Florida, an opinion was entered holding the supplemental Allen type instruction error.

In issuing a Writ of Certiorari, the Florida Supreme Court quashed the decision of the District Court, holding the "Allen charge" not erroneous, but pointing out the standard jury instruction, approved by the court, preferable in criminal cases arising in the State.

With regard to the "twenty minute" instruction, the Florida Supreme Court stated:

* * *

> "Respondent also argues that the trial court erred in permitting the jury another twenty minutes deliberation after they had been recalled and had informed the trial judge that they were closer to reaching a verdict. Again, we must disagree. At no time did the trial judge attempt to coerce the jury into reaching a verdict; nor did he lead them to believe that they *must* reach a verdict. This period merely allowed them an opportunity to reach a verdict after they had informed the trial judge that they were closer to doing so, and they returned voluntarily short of the allotted time. No error appears.

"Accordingly, the decision of the First District Court of Appeal is quashed, and the cause remanded for reinstatement of the verdict and judgment." 290 So.2d 482 at 484. (Emphasis by Court)

* * *

On a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, the United States District Court for the Middle District of Florida found, as a matter of law, the Allen charge, coupled with the twenty minute instruction, coercive.

On appeal to the United States Court of Appeals, Fifth Circuit, the United States District Court's finding was reversed when it was held:

* * *

"Viewed in the totality of circumstances, we think the district judge erred in deciding from the state record that the jury was necessarily coerced to the point of constitutional prejudice to the defendant. . . ." 511 F.2d 644 at 646.

* * *

Thereafter Petitioner has filed this instant action seeking review by certiorari of the Circuit Court's judgment.

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REASONS WHY THE WRIT SHOULD NOT ISSUE

It is Petitioner's argument that the Fifth Circuit erred in concluding no coercive effect occurred by the state trial court's instruction allotting extra time for deliberation coupled with the prior supplemental "Allen type" instruction. He submits such procedure was unconstitutionally coercive, and the decision of the Fifth Circuit is in conflict with all other circuits on the question.

In support of this conflict, Petitioner cites *Goff v. United States*, 446 F.2d 623 (10th Cir., 1971); *Burroughs v. United States*, 365 F.2d 431 (10th Cir., 1966); *United States v. Lansdown*, 460 F.2d 164 (4th Cir., 1972); and *Jones v. Norvell*, 472 F.2d 1185 (6th Cir., 1973). Each of the above decisions are factually distinguishable in that each concerned a prosecution for a crime arising in a federal court, while the procedures here occurred in a state prosecution.

Admittedly, if the trial judge's statements had a coercive effect on the jury, Petitioner's judgment and sentence must be reversed. *Jenkins v. United States*, 380 U. S. 445, 13 L.Ed.2d 957, 85 S.Ct. 1059 (1965).

By the very nature of relief Petitioner has sought in federal court habeas corpus pursuant to 28 U.S.C. §2254, a determination of a factual issue made by a state court, as evidenced by their written opinion in this cause, comes clothed with a presumption of correctness. See 28 U.S.C. §2254(d); *Dempsey v. Wainwright*, 471 F.2d 604 (5th

Cir., 1973). Yet, Respondent recognizes that state court judgments on federal constitutional questions, while not conclusive, are entitled to great weight in federal habeas corpus actions. *Burns v. Crouse*, 353 F.2d 489 (10th Cir., 1965).

The Fifth Circuit Court below clearly adopted the findings of the trial court as supported by the Florida Supreme Court's opinion, holding no coercive atmosphere was created, for at no time did the trial court state the jury must reach a verdict.

Such reasoning distinguishes the case at bar from *Burroughs*, supra, where an instruction entreating the jury to strive toward a verdict by a certain time was found error. There, after deliberating for one hour and twenty minutes, the jury reported it was dead-locked. Being informed that the last three ballots were exactly the same, the trial court gave a severely modified "Allen charge", then stated:

* * *

> "I am going to ask you to go back and work a little longer, we will say until 7:00 o'clock. If you can't by that time, it would be the opinion of the court because of the importance of the case, because of the expense incurred, because of the expense yet to be incurred should you not get together, to probably recess the matter until in the morning and then let you go back to deliberations."
> (At Page 434)

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* * *

Such instruction was held coercive for the obvious reason that, failing to reach a verdict by 7:00 p.m., the jury was lead to believe they would recess and return the next day, therefore they must reach a decision in this case. See also *Jones v. Norvell*, supra, where the coercive statement coupled with the "Allen charge" was:

* * *

". . .'[I]t is your duty to reach a verdict if you can possibly do so--you 12 people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones.'" (At Page 1185)

* * *

This cause is also factually distinguishable from *Goff*, supra. After giving an "Allen type" instruction, the trial court immediately made the following statement to the jury: "If you cannot (reach a verdict) within, oh, we'll say the next hour or so and probably ought to go to lunch first, then, we'll have to declare a mistrial and set the case down for hearing again." The appellate court held such statement impermissibly suggestive and coercive as placing a time fuse on the period of jury deliberation. Likewise, such statement was clearly an attempt by the trial judge to coerce the jury into agreement before discharging it and declaring a mistrial.

Such results are avoided here, for the

trial judge, after the jury had retired, specifically noted that the jury was ". . . not going to consider whether or not they can be discharged."

Factually, the closest case on point is *Lansdown*, supra. The trial judge had discharged the jury after some two and one-half days of deliberation in the face of the foreman of the jury stating they were on the verge of a verdict and another juror requesting ten more minutes for deliberation. The indictment was subsequently dismissed on the ground of double jeopardy, and such action affirmed by the circuit court of appeal, holding that there was no manifest necessity for the trial court to declare a mistrial.

Respondent submits that *Lansdown*, supra, stands for the proposition that the trial judge will err if it dismisses a jury and declares a mistrial when the jury had informed the court is was closer to reaching a verdict and requests more time to deliberate.

In this cause, Petitioner's objection to both the giving of the "Allen charge", and the trial judge's allowance of more time for jury deliberations solely on the basis that he thought the jury did not know they could be discharged. At no time did the Petitioner move for a mistrial. Therefore, had the trial judge discharged the jury after being informed it was closer to reaching a verdict without giving it further time to deliberate, the reasoning in *Lansdown*, supra, would have been controlling, and retrial would have been barred by double

jeopardy.

Respondent submits the instructions given by the trial judge in this cause were not coercive, and the Florida Supreme Court correctly held that the trial judge did not attempt to coerce the jury into reaching a verdict, nor lead them to believe they must reach a verdict. Compare *United States v. Graydon*, 429 F.2d 120 (4th Cir., 1970) where after an "Allen charge" had been given, a statement "If you fail to agree on a verdict, the case must be retried" was held not to be coercive.

The Fifth Circuit in the case at bar has not reached a result in conflict with the above opinions but indeed its opinion is in harmony with *Lansdown*, supra. Likewise, its factual determination that no coercion occurred is a finding supported not only by the record but also by the decisions of both the state trial court and the Florida Supreme Court.

Respondent submits that the Fifth Circuit below, faced with the peculiar facts presented in this cause, did not resolve any substantial federal question and that this Court should not exercise its discretionary jurisdiction to review by certiorari the decision of the court below.

CONCLUSION

For the reasons stated hereinabove, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to the Petition for Writ of Certiorari has been forwarded to the Honorable Joseph S. Farley, Jr., Attorney for Petitioner, 350 East Adams Street, Jacksonville, Florida, by mail, this _____ day of September, 1975.

GEORGE R. GEORGIEFF
Assistant Attorney General